> *ginia*, 423 (1951), both of which authorities were cited in the court's per curiam order of September 3, 1965, is applicable to this case. Furthermore, appellant submits that the principle as applied here would dictate a judgment in favor of appellant."

Petitioner and respondent, in respect to the three dates noted by the appellate court, stipulated in their respective supplemental briefs that the date of the third subcontract was July 19, 1960. The stipulation also indicated to the court the date of Harman's default on the third contract (the second date referred to by the court) by quoting a letter from petitioner to Harman's surety on the third subcontract. In respect to the third date referred to by the court (when petitioner received actual or constructive notice of the assignment to respondent), the parties did not agree but submitted as part of the stipulation information regarding other correspondence.

Petitioner states at pages 5-6 of its petition that upon the filing of the supplemental briefs in accordance with the appellate order "it became evident that there *was* a serious dispute as to whether, at the time that Glassman's right to set-off arose against Harman on the third subcontract of July 19, 1960, Glassman had notice of Harman's assignment to Fidelity of the proceeds due under the two subcontracts of December 14, 1959" (i.e., the third date referred to by the appellate court).

The appellate court stated that it based its holding in the case on the following facts:

> "The facts here show that the Harman subcontracts bonded by Fidelity were entered into December 14, 1959, that Fidelity, as surety for Harman, executed the payment bonds covering the two subcontracts on the following day, December 15, 1959, that Glassman's third subcontract with Harman, not bonded by Fidelity, was entered into on July 19, 1960, and that the default on all three subcontracts occurred on November 30, 1960. These facts present for our resolution two questions: (a) when did the assignment become effective, and (b)

when did Glassman receive notice thereof." (356 F.2d 340, 342; Appendix B, at p. 19 of the Petition.)

The facts referred to in the quoted passage of the appellate decision will be found as part of the facts set forth in the Statement in Glassman's Petition herein at pages 3-4, and are *not* disputed by the parties.

In respect to the two questions posed in the above passage from the appellate decision, question (a) relating to the effective date of the assignment to the surety was resolved by a conclusion of law and petitioner Glassman does *not* take issue therewith in its petition.

The second question resolved by the court ("(b) when did Glassman receive notice thereof"), is related to the third date regarding which the appellate court inquired in its order of September 3, 1965, whether controversy existed, and is the source of petitioner's issue brought to this court.

The appellate court resolved that question as follows:

> "The issuance of the bonds was notice to Glassman of the assignment of Harman's rights to Fidelity. Virginia law required the bonds. Glassman's contracts with Harman required the bonds, Glassman received copies of the bonds at the time they were issued and indeed was an obligee thereon. Even without considering the general practice in the industry, it is clear from these facts that Glassman had notice of the assignment. However, subrogation as a matter of law resulted on the payment of the bonds, and relates back to the time of issuance; notice to Glassman, of course, is presumed therefrom." (356 F.2d 340, 343; Appendix B, at pp. 20-21 of the Petition.)

It is this conclusion which petitioner argues constitutes an improper finding of fact by the appellate court.

ARGUMENT

I.

Holding Objected to Is One of Law and Not a Finding of Fact.

Petitioner states it seeks a writ on the grounds (as set forth at page 6 of the Petition) that the following holding of the appellate court constituted "findings of fact" and "was totally unsupported by the record and was contrary to fact":

> "The issuance of the bonds was notice to Glassman of the assignment of Harman's rights to Fidelity. Virginia law required the bonds, Glassman's contracts with Harman required the bonds, Glassman received copies of the bonds at the time they were issued and indeed was an obligee thereon." (356 F.2d 340, 343; Appendix B, at pp. 20-21 of the Petition.)

Petitioner overlooks the additional sentence in the same paragraph which forms a part of the holding relating to actual or constructive notice as follows:

> "Moreover, subrogation as a matter of law resulted on the payment of the bonds, and relates back to the time of issuance; notice to Glassman, of course, is presumed therefrom." (Ibid.)

This conclusion of legal subrogation is a determination of law (and a primary legal contention below by respondent) to which petitioner has not objected.[1]

Furthermore, the portion of the holding which petitioner quotes (i.e., that issuance of the bonds constituted notice) was also a determination of law premised on a statute and undisputed fact. The court's premises included: "Virginia law required the bonds"; this clearly is a stat-

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[1] The date of issuance of the bonds, December 15, 1959, was a fact stipulated at the trial level and not disputed, and is set forth as a fact in petitioner's Statement of Facts in its petition.

utory matter. It noted that "Glassman's contracts with Harman required the bonds" and this was not a new fact, having been before the trial court and the appellate court as evidenced by paragraph 1 of "Plaintiff's Statement of Material Facts as to which there is no Genuine Issue" (p. 14 of the Consolidated Joint Appendix forming part of the record herein), and not disputed. The court stated, "Glassman received copies of the bonds at the time they were issued and indeed was an obligee thereon"; and this is not disputed, was not the subject of the inquiry by the appellate court and, in any event, is implicit from the aforesaid statutory and contractual requirements.

The facts upon which the appellate court relied in reaching its legal conclusions were explicitly stated by it as follows:

> "The facts here show that the Harman subcontracts bonded by Fidelity were entered into December 14, 1959, that Fidelity, as surety for Harman, executed the payment bonds covering the two subcontracts on the following day, December 15, 1959, that Glassman's third subcontract with Harman, not bonded by Fidelity, was entered into on July 19, 1960, and that the default on all three subcontracts occurred on November 30, 1960. These facts present for our resolution two questions: (a) when did the assignment become effective, and (b) when did Glassman receive notice thereof." (356 F.2d 340, 342; Appendix B, at p. 19 of the Petition.)

None of these facts has been disputed and indeed each is specified by petitioner itself to be part of the pertinent fact in its State at pages 3-4 of its Petition herein. Thus the appellate court reached its legal determination (that petitioner was on notice of the assignment) after applying legal principles not contested here by petitioner to facts not in dispute, namely, the existence and dates of bonds, contracts and Harman's default.

In essence, petitioner is contending that the legal conclusion from undisputed facts, that petitioner had constructive notice of the assignment prior to the existence

of its set-off, constitutes a finding of fact. But it is long established that a determination of constructive notice is a conclusion of law. 2 *Pomeroy's Equity Jurisprudence*, 5th ed., Section 604. That the appellate court inquired as to the existence of controversy over the date of notice does not convert the court's holding of constructive notice into a finding of fact.

The appellate court commented in footnote 11 on petitioner's contentions that it had no notice of the assignment but held the contention was "untenable" for the reasons" set forth in the text of the decision.

Petitioner's authorities in sections I and II of its petition relate to factual determinations by appellate courts and therefore are not apposite, there being no fact findings here. Similarly, petitioner's suggestion in section III of a conflict in circuits is not apposite.

Whether or not the legal conclusion reached by the appellate court is erroneous or valid is not an issue raised by the petition and therefore no discussion is necessary.

II.

Court of Appeals Did Not Order Production of Evidence nor Make Findings of Fact and, in Any Event, Petitioner Concurred in Procedure.

Petitioner premises its petition on the argument (as set forth in its "Question Presented") the appellate court cannot properly "order the production of evidence, weigh and consider such evidence, make findings of fact therefrom, and on the basis of such findings affirm."

The appellate court did none of these things. In its order of September 3, 1965, it requested briefing on a legal point (relative priorities) and advised the parties that disposition of the case "may turn on certain facts not appearing in the record as presently constituted." (Appendix C,

at p. 23 of the Petition.) It then noted the facts to be (1) the date of the third subcontract with Harman; (2) the date of Harman's default on the third subcontract; (3) the date when Glassman "received notice, either actual or constructive, of the assignment provisions."

The court did not ask for evidence but simply posed the following inquiry to the parties:

> "Are any of the dates referred to in (1), (2) and (3) above controverted by the parties to this appeal?" (Appendix C at p. 24 of the Petition.)

The parties then entered into a stipulation regarding these three dates, which stipulation was set forth in their respective supplemental briefs. (See as part of the record herein the Supplemental Brief for Appellant at pp. 4-7 and the Supplemental Brief for Appellee at pp. 1-4.) The parties agreed that the third subcontract was dated July 19, 1960, and they indicated the date of default on the third subcontract by quoting in its entirety a registered letter issued by petitioner Glassman to Harman's surety on the third subcontract. These dates are not contested by petitioner and indeed are relied on by it in the petition.

In respect to the third date, as to which the appellate court asked whether it was controverted by the parties, the parties did not stipulate but as petitioner states at page 5-6 of its petition, "it became evident that there *was* a serious dispute as to whether" Glassman had notice of Harman's assignment. However, the parties did submit as part of the stipulation a summary of certain additional correspondence.

Petitioner's interpretation of these events is unwarranted. The appellate court did not "order the production of evidence" and did not "make findings of fact therefrom." As noted in the prior argument the court's *factual* premises were the dates of the subcontracts, the bonds, and the default, none of which was or is in dispute.

Even if the appellate decision was based entirely on new facts, such did not involve controverted facts being weighed and decided by the appellate court nor was it an instance of an untried issue of fact being arbitrarily resolved by the court. Rather, in response to an inquiry by the court whether certain facts were controverted, the parties stipulated gratuitously to the extent they could as to certain dates.

Petitioner did not object to the procedure until it received an unfavorable decision. This was too late. An appellant should not be heard to argue improper procedure below when the impropriety consists of its own submission of stipulated facts, which stipulation it continues to recognize as accurate.

If the essence of petitioner's objection is that it did not have *actual* notice of the assignment and the appellate court could not resolve this question because such would constitute a finding of fact, then its position is still not sound. The appellate court did not determine when petitioner had *actual* notice and such is immaterial. The court held that petitioner was presumed as a matter of law to have notice of the assignment on the basis of the subcontracts, the bonds, and the Virginia statute. As noted above, these particular matters involved no disputes of fact whatsoever, and, indeed, petitioner does not contend otherwise.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for Respondent in Opposition were hand carried and delivered to Leonard S. Melrod, 815 Connecticut Avenue, N. W., Washington, D. C., counsel for petitioner, this 27th day of May, 1966.

Thomas H. McGrail